

1 G. SCOTT EMBLIDGE, State Bar No. 121613
 2 emblidge@meqlaw.com
 3 RACHEL J. SATER, State Bar No. 147976
 4 sater@meqlaw.com
 5 ANDREW E. SWEET, State Bar No. 160870
 6 sweet@meqlaw.com
 7 MOSCONE, EMBLIDGE, & QUADRA, LLP
 8 220 Montgomery Street, Suite 2100
 9 San Francisco, California 94104-4238
 Telephone: (415) 362-3599
 Facsimile: (415) 362-2006

10 Attorneys for Plaintiff

11
 12
 13 UNITED STATES DISTRICT COURT
 14 NORTHERN DISTRICT OF CALIFORNIA

15 COYNES L. ENNIX JR., M.D.,

16 Plaintiff,

17 vs.

18 ALTA BATES SUMMIT MEDICAL
 CENTER,

19 Defendants.

20 Case No. C 07-2486 WHA

**PLAINTIFF'S MOTION IN LIMINE
 NO. 2 TO EXCLUDE EVIDENCE
 OF DISMISSED MALPRACTICE
 CLAIM; DECLARATION OF
 RACHEL SATER**

Trial Date: June 2, 2008
 Dept: Ctrm. 9, 19th Floor
 Judge: Hon. William H. Alsup

21 Plaintiff Coyness L. Ennix, Jr. ("Dr. Ennix") moves to exclude evidence and argument
 22 relating to a medical malpractice claim filed against Dr. Ennix which has been dismissed with
 23 prejudice without any payment by Dr. Ennix.

24 The sole issue in this case is whether race was a factor in ABSMC's peer review actions
 25 against Dr. Ennix that nearly ruined his career as a cardiac surgeon. That peer review addressed
 26 ten cases. With respect to one of those cases, a claim alleging product liability and medical

1 malpractice was filed against Dr. Ennix and the maker of a medical device used in that case—
 2 *Tong, et al., v. Medtronic, Inc., Coyness Ennix, M.D., et al.*, Alameda County Superior Court
 3 Case No. RG05197579 (“*Medtronic Case*”). However, the plaintiffs dismissed the suit with
 4 prejudice—without any payment by Dr. Ennix—in exchange for a waiver of costs and Dr.
 5 Ennix’s promise not to file a malicious prosecution action against the plaintiffs. The fact that a
 6 meritless suit was filed and dropped against Dr. Ennix has no probative value regarding
 7 ABSMC’s motivation or the veracity of its proffered justification of protecting “patient safety.”
 8 Nor is it probative with respect to whether Dr. Ennix met the standard of care in that case.
 9 Finally, any potential probative value would be substantially outweighed by the prejudicial
 10 impact of such evidence and the likelihood of misleading and confusing the jury.

11 Therefore, the Court should exclude evidence and testimony regarding the *Medtronic*
 12 case.

13 STATEMENT OF FACTS

14 Dr. Ennix claims that ABSMC discriminated against him based on his race in violation of
 15 42 U.S.C. § 1981 in a peer review that began in early 2005 and concluded in July 2006. When it
 16 deposed Dr. Ennix, ABSMC questioned him regarding the *Medtronic* case. (See Sater Decl., ¶ 2,
 17 Exhibit A.) On April 24, 2008, the plaintiffs in the *Medtronic* case filed a request for dismissal
 18 with prejudice, including all claims and all causes of action. (Sater Decl., ¶ 3, Exhibit B.) Dr.
 19 Ennix paid no monies and agreed to waive costs and not to file a malicious prosecution action
 20 against the plaintiffs. (Sater Decl., ¶ 4, Exhibit C.)

21 ARGUMENT

22 This Court should exclude all evidence and testimony regarding the *Medtronic* case.
 23 Evidence is admissible if it is probative as to a “fact of consequence” and its probative value is
 24 not “outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the
 25 jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative
 26 evidence.” FRE Rules 401, 403. In this case, that someone filed a meritless suit against Dr.

Ennix and later dismissed the suit with prejudice is not probative of any matters related to this lawsuit. On that basis, all such evidence should be excluded.

However, even if the dismissed *Medtronic* claim had any probative value in this case, such minimal value would be outweighed by its potential for unfair prejudice and confusion of the jury, which might erroneously credit the suit with merit that it manifestly lacked. Further, presentation of this extraneous evidence would unnecessarily waste time and delay conclusion of this case. For these additional reasons, this Court should exclude such evidence.

CONCLUSION

For the foregoing reasons, Dr. Ennix respectfully requests that the Court exclude all argument or evidence relating to the *Medtronic* case.

Respectfully submitted,

Dated: April 29, 2008

MOSCONE, EMBLIDGE & QUADRA, LLP

By: _____ /s/
Rachel J. Sater

Attorneys for Plaintiff

1 DECLARATION OF RACHEL J. SATER
2

3 I, Rachel J. Sater, declare:

4 1. I am an attorney licensed to practice law in the State of California and in this
5 Court. I am an attorney at Moscone, Emblidge & Quadra, LLP, counsel of record for the
Plaintiff.

6 2. Attached hereto as Exhibit A is a true and correct copy of the deposition transcript
7 of Dr. Ennix.

8 3. Attached hereto as Exhibit B is a true and correct copy of the Request for
9 Dismissal filed in *Tong, et al., v. Medtronic, Inc., Coyness Ennix, M.D., et al.*, Alameda County
10 Superior Court Case No. RG05197579.

11 4. Attached hereto as Exhibit C is a true and correct copy of a January 28, 2008
12 letter to Dr. Ennix from Robert Slatery.

13 I declare under penalty of perjury under the laws of the State of California that the
14 foregoing is true and correct to the best of my knowledge.

15
16 Dated: April 29, 2008

17 _____ /s/
Rachel J. Sater

1 MAUREEN E. MCCLAIN (State Bar No. 062050)
2 Email: mcclain@kmm.com
3 ALEX HERNAEZ (State Bar No. 201441)
4 Email: hernaez@kmm.com
5 KAUFF MCCLAIN & MCGUIRE LLP
One Post Street, Suite 2600
San Francisco, California 94104
Telephone: (415) 421-3111
Facsimile: (415) 421-0938

6 TAZAMISHA H. IMARA (State Bar No. 201266)
7 Email: imara@kmm.com
8 KAUFF MCCLAIN & MCGUIRE LLP
2049 Century Park East
Suite 2690
Los Angeles, CA 90067
9 Telephone: (310) 277-7550
Facsimile: (310) 277-7525

10 Attorneys for Defendant
11 ALTA BATES SUMMIT MEDICAL CENTER

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA

15 COYNESS L. ENNIX, JR., M.D.,

16 Plaintiff,

17 v.

19 ALTA BATES SUMMIT MEDICAL CENTER,

20 Defendant.

21

22

23

24

25

26

27

28

CASE NO. C 07-2486 WHA

**DEFENDANT'S OPPOSITION TO
PLAINTIFF'S MOTION IN LIMINE
NO. 2 TO EXCLUDE EVIDENCE
OF DISMISSED MALPRACTICE
CLAIM**

DATE: May 19, 2008
TIME: 2:00 p.m.
DEPT: Ctrm. 9, 19th Floor
JUDGE: Hon. William H. Alsup

COMPLAINT FILED: May 9, 2007
TRIAL DATE: June 2, 2008

1 Plaintiff asks that this Court exclude evidence related to a malpractice
2 claims made against him. Defendant does not intend to present any such evidence.
3 However, pursuant to Fed. R. Civ. P 32(a)(1) & (8), Defendant reserves its right to use at
4 trial Plaintiff's deposition testimony from this malpractice action. Defendant will do so
5 without revealing the nature of the underlying malpractice action. Moreover, for the
6 reasons stated in Plaintiff's motion, Defendant asks that evidence relating to any
7 collateral litigation (i.e., malpractice actions or sexual harassment actions) against all
8 members of ABSMC's Medical Staffs be excluded from evidence.

9 DATED: May 9, 2008

KAUFF MCCLAIN & MCGUIRE LLP

11 By: 
12 ALEX HERNAEZ

13 Attorneys for Defendant
14 ALTA BATES SUMMIT MEDICAL
15 CENTER

28

- 2 -